LIBERTY UNDER LAW AND ADMINISTRATION

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By

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CONTENTS

Part One

PAGE

LIBERTY 1

Part Two

LIBERTY UNDER LAW 47

Part Three

LIBERTY UNDER ADMINISTRATION 101

Part One

LIBERTY

LIBERTY

I

Let me confess at the outset that I might have resisted your invitation to join the company of scholars who have spoken under the auspices of the William H. White Foundation had I noted earlier the somewhat disconcerting pronouncement of Count Keyserling that "the only authentic culture in America is to be found in Virginia." There is little likelihood, however, that I shall be able to contribute to your culture or add to your learning. My sole object is to invite you, as citizens rather than as scholars, to consider the old problem of liberty and its relation to law and to government—a problem that is, indeed, old; but which, in the fulness of time, has again become new in this new day.

It would not be orthodox in these times to begin any lecture without asserting that we are in one of civilization's periods of extraordinary transformation. This, I believe, was also the conventional opening for orators prior to the days of

ancient Greece and Rome. Indeed, the whole story of mankind could be written around these recurrent periods of change; and, no doubt, we are in one of these historic eras now.

Certainly we are all conscious of "new forces moving on the forehead of the world." For the moment we are aware of these forces chiefly in their economic aspects. It is not difficult, if one is pessimistically inclined, to indict the existing order with no end of actual vices; and to conclude that unless they can be cured, disaster and revolution are inevitable and that the sun of Western civilization will go down and leave the world in the darkness of a new beginning. Many of my eminent legal brethren appear to be especially obsessed by these fears. Such forebodings seem to me to be totally unwarranted. Our social order, undoubtedly, is changing, as it has ever changed, but it faces neither collapse nor revolution. The long experience of history proves that nature cures the ills of the body politic by much the same patient processes by which it cures those of the body physical. It is precisely this kind of curative force which is now at work.

Change there is, indeed, in the social order and in the individuals who constitute it. But this is evolution, not revolution. Moreover, these internal or evolutionary forces seem to me of far more significance than the external or so-called revolutionary ones which assume so large a place in our thoughts and fears.

Unquestionably man's attitude towards life and its institutions is undergoing marked change. His search for new values, new creeds and new ideals is indicative of new thought processes and, I believe, forecasts transformations in his concepts of individual and collective freedom. But this does not justify the conclusion that such transformations are in the nature of a social or economic or political revolution. Because individual and collective thought may be changing or new concepts of might and right and social justice be in the making, it does not follow that a radically new social order is inevitable, or that an economic system, which reveals so many defects, is necessarily doomed. The mechanism of civilization is still sound and capable of adjusting itself to the changing world. The stresses and strains of today are

no greater than those civilization has had to endure so often in the past. Surely the means and the intelligence needed to meet them are infinitely greater now than they have ever been in any previous period of history.

Because "Things are in the saddle and ride mankind," or materialism appears to be triumphant, or public and private morals and social and economic justice seem askew, or discord and inefficiency prevail, and all the world resembles a bedlam, society will not collapse. The spirit of man will see to that. Our traditional virtues and ideals are neither dead nor dying. An artificial world may be permeating and poisoning the natural world, as Spengler says, but every poison has its natural antidote. Even though the relations and subordinations of man to the State may change, his instinctive attitudes, like those toward liberty and justice, do not change. Indeed, if you will but think of change, with all its ebbs and flows, struggles and conflicts, selections and rejections, as a necessary law of growth, or as the evolutionary process of life, what is now happening, bewildering though it be, should fill us with visions

of hope instead of despair. For it means growth —life.

In short, let us not be unduly disturbed by all this flow and change. Institutions are not final. They are as transitory as life itself. As Heraclitus pointed out long years ago, life is always in a state of flux like a river. Society, and even the State, in the ultimate analysis, is life and not something built to a formula. It grows, it lives, it survives, by virtue of some inner force which is the life current of its era. No one can note the superb elan with which men have met the problems and tribulations of these latter days without believing that this current is still undefiled and capable of carrying us safely to our destination. The world may seem like a bedlam, but the individuals constituting it have not gone mad. What is really happening is that man is beginning to see his world and its increasingly complex human phenomena differently and more realistically. He is awakening to the need and the possibility of a finer and fairer social order, of improved and more justly controlled industrial relationships, and a better and more collectively planned economy. All of

which, I think, means a new integration and something, indeed, of a new order of liberty.

But "man's portion is the path and not the goal." How shall he achieve his freedom as society treads that uncertain path? It would be strange, indeed, if man should not seek and follow new avenues, when you consider the flood of light that has been thrown on his ways and on his institutions, his relationships and the nature of his own self, by the marvellous advancements in human learning. Is it not possible that this era of change may mean also an alteration in our concept of liberty and our ways and means of attaining and preserving it, individually and collectively, under law and under government? The object of these lectures is to explore that possibility.

II

Some one has said that there are ten thousand definitions of religion; and I fancy you might say the same of liberty. So I, for one, shall not attempt to define the indefinable. Most of our difficulties in understanding liberty, I venture to

say, are due to too much philosophizing about it, thereby disposing us to see it too abstractly and to think of it as something so absolute that it takes on the aspect of a symbol and, thus, becomes an academic and sterile ideal, instead of the most human and real of all relationships and institutions.

In any attempt to interpret either the philosophy or history of liberty, it would be well, I imagine, to ask first what the philosophy of history itself (if such philosophy there be) has to teach us as to the forces which have shaped its course. What constants are there in its long equation? To what enduring, unifying, immemorial note is its rhythm attuned?

History's long story of the rise and fall of civilizations, from Babylon to Leningrad, reveals no one uniform source of growth, strength or decay. There may be such one unceasing purpose or one unifying certitude, but as I read the philosophy of history I find none, unless you might say it is the steady and relentless urge for liberty.

From Plato to Henry Adams, schools of philosophers, metaphysicians, theologians, and jurists

have engaged in learned dispute as to just what is the source and nature of this *Straum der Welt* and what law governs its currents. One school sees only the moving hand of divine Providence, while another traces the workings of some law of individual and collective self-determination as manifesting itself in work, thought, adventure, rivalry, or the mere struggle to live. Others, like Montesquieu and Buckle, profess, as you know, to find the key to the great riddle in geographic, climatic, and environmental influences, or, like Comte or Marx, in the rationalistic or materialistic. The newer schools wrestle with ideas of behaviorism and the experiential and deterministic or with the startling possibilities opened up by the physicists or biologists and their discoveries and speculations as to the laws of nature, of relativity, and what not, including, if you will, the possible operation, *a la* Henry Adams, of the second law of thermodynamics in the area of human and social energy.

However, any exploration of this huge field interests us here only to the extent that it may reveal the place and function of liberty in the domain of government and of our human relation-

ships under it. Perhaps, if Henry Ford knew history as it is written and philosophized, he could be excused for calling it "bunk." Perhaps, too, that German philosopher was right when he said that all that history teaches us is that it teaches us nothing; which really means, I take it, that history proves that nations have always been incapable of profiting by each other's experiences and mistakes.

Let us then, for the moment at least, assume that the one constant factor is the desire for individual freedom and relate that concept with Professor Giddings' rather moving generalization that "history is a stream of behavior, rising obscurely in time, making for itself a devious channel, fed by countless tributaries of collective action and broadly flowing into the mist that hides an unexplored hereafter. In part the historic behavior of men moving on together by thousands and millions has been blindly instinctive. In part it has been conscious, if often errant, experimentation."

Now the major premise of my thesis, waiving aside endless other coefficients of truth, is that the

most fundamental and most continuously and consciously operative of these behavioristic instincts is liberty—a primordial urge for freedom. If behavior determines history, liberty determines behavior. Life, with all its adventures, rivalries, creations, variations, innovations, and welter of elements, predicates freedom as a law of its fulfillment.

> "For whether on the asses' bridge
> Or on the ship of fools
> Life is agog!"

And life is always a law unto itself. Its acts and its actions, taken as a whole or as manifest in the institutions it sets up or tears down, are never reasoned or even logical processes. If they were, wars would long since have vanished and the lessons of experience would have taught the world to be infinitely wiser than it is.

Concede that liberty is more a product of instinct and of behavior than it is of reason, it none the less has been the one social nexus and the one persistent aspiration of men, from primitive times. Often thwarted, forgotten, neglected, and abused, it, next to religion, has been the most enduring of

man's spiritual strivings and impulses. Torrents of blood have been shed and legions of martyrs have died to convert its aspirations into actualities. I have no desire, however, to add to the oceans of rhetoric with which liberty has been deluged. I may say, however, that I approve of any tributes to the divine goddess, howsoever sophomoric they may be; for in the hurly-burly of our day-by-day living and our struggle for material success, there is a disposition to forget how vital liberty is to life, and how much more it should be than a mere subject for schoolboy essays, or for orators with "the right hand of eloquence in the frock coat of statesmanship."

What can be more important, for instance, than to keep ourselves conscious of our traditional ideals, of liberty of speech and thought and teaching, or liberty of the press, the pulpit, the platform, the air—even if we do more talking than thinking about them? In this sense it is even possible that Prohibition, for example, may have been worth all it cost, if only because it made people conscious of "personal liberty" and set them to thinking and quarrelling as to what it is.

To say that your "personal liberty" entitles you to do as you please regardless of the rights and liberties of others—to exploit, oppress, victimize, or enforce superiorities of strength, privilege, or position, is, of course, the negation of liberty, as we shall see when we come to discuss liberty and law. In *Quentin Durward*, you recall Scott has a Bohemian character, who was asked what he had out of a life in which he bowed to "no law, no leader, no house, no home, no country, no government, and, may Heaven enlighten you, no God." Said he, "I have personal freedom, I crouch to no one, obey no one. I go where I will, live as I can and die when my day comes. . . . I can always die and death is the most perfect freedom of all." Most of us, I fancy, have something of that primitive conception and, also, that primitive urge, as witness our periodic desire to defy the law or to escape the necessary disciplines of society by fleeing to the primeval forests or the great open spaces. Perhaps, too, it is this primitive urge for "personal liberty" which makes us, as descendants of pioneers, what some of our foreign critics call "a nation of nomads," restless, adventurous, in-

capable of leisure and given to frantic haste and love of change.

It was some such idea of the primitive survival of liberty as innate in the soul of man that led Rousseau to say "man is born free; yet everywhere he is in chains"; or, at least, it was this idea of freedom, as something primordial and eternal, on which he built his theory of the *contrat social.* It would be interesting, if time permitted, to trace the influence and bearing of his theories of freedom on our own history and our own ideas on this subject. At least it would serve to illustrate the potency of an abstract idea and show how, if it fits in with natural instincts and survivals of racial experience, and with thought processes and life currents of time and place, it can work enormous social and political changes, even if it be unsound —for, as was said of Rousseau, "ignorant of politics and society alike, his ideas somehow managed to revolutionize both."

What I have said is intended merely to indicate how purely instinctive and how entirely vague is most of our thinking about liberty and how easily we can overlook its vital character as an element

in our own institutional life. Liberty may be a primordial instinct or the love of it be "innate in the heart of man," but it cannot operate *in vacuo*, so to speak. It may be a law of nature, if you like that phrase, but it is not a self-operating law. It takes on no meaning, at least for our line of thought here, until relational elements appear (clan, gens, tribe, family, state), out of which grow rights, duties, limitations, law, and freedom.

The exigent problems of today in their immediate social aspects turn on the maintenance of liberty. Nothing else matters if man cannot be free. Now, if ever, it is not only eternal vigilance but eternal thinking that is the price of freedom. Therefore, popular consciousness of its nature and shifting character seems to me to be all-important; for when we come to consider its relation to law, we shall see how current ideas about it may have profound juristic effects.

Then, too, if I may repeat myself, the very idea of keeping liberty alive, and vivid in the public mind is of the utmost importance, especially in discordant and bewildering times, when some uni-

fying and traditional ideal is needed to stir the souls and even the passions of peoples.

In fact, I am inclined to think, in spite of so much that looks like evidence to the contrary, that we are witnessing a rebirth of our ancient passion for freedom and our traditional disposition to fight for it. Possibly some of our excessive demoralizations in crime, or in apparent social anarchy, are at bottom perversions of this impulse. With life so much at loose ends from one angle, and so mechanized from another, we might expect some sort of compensating reactions and find them in movements like those of "new youth," "new morals," "new thought," and, possibly, I should add "new deals."

It may be, also, that it is this reawakening of our ancient passion for liberty which makes us feel that strange events are astir, or that makes us restive, for example, under what we think are unnecessary tyrannies like those of "too much law," or too many conventions and virtues supposedly outworn and outmoded. Then, too, we have suddenly become conscious of our unnecessary social chaos, the tyrannies of the machine, and the de-

structive effects of ignorance and selfishness, while with it, also, has come something of an apparent loss of faith in the validity of many of our traditional virtues, so that we often confuse license with liberty, and protected freedom with arbitrary coercion. Take the ready ear we give to the reformers, enthusiasts and uplifters on the one hand, and the cynics, neurotics, and "debunkers" on the other. Is it not possible to interpret even such manifestations as evidences of a new spirit of liberty striving to be born?

In any event, in all these fermentations I see no reason for despair. It was the passion for freedom that made America and the same passion will save it. I see the future in the light of Milton's shining vision. In a period of chaos greater than ours and one which also saw the birth of a new liberty, he said: "Methinks I see in my mind a noble and puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks; methinks I see her as an eagle mewing her mighty youth; and kindling her undazzled eyes at the fierce mid-day beam." Perhaps the evidences of social chaos which fill so many hearts with fear are

but preludes, not so much to a new social order as to a new social faith—a faith in action. Old ideas die away; young ones spring up, vague, rebellious, unripe, incomplete and, perhaps, absurd, but they are the seed of a better future—a future whose life is just begun.

III

I suppose I should here confess that, to my way of thinking, something of this Miltonian faith in a new birth of freedom and the possibility of shaping and directing it to beneficent ends is more or less implicit in the extraordinary movements of today which go under the generic name of "the new deal."

This is not the time nor the place to expound or defend the "new deal." Still it is apropos, in this survey of liberty, to say that the aim of the "new deal" is conceived in terms of individual freedom. Its aim is not to cast new fetters but to cast off old ones; to free society from some of the accumulated tyrannies of vested ignorance and selfishness, of entrenched privilege and power, of bad law, bad economics, and bad politics, and,

thus, to create conditions in which a finer and more complete personal freedom may flourish. Its object is not to usurp economic power or to dominate and direct its forces, but to release them. It is not a matter of control in its larger sense—it is, rather, a matter of co-operation and service. If, in the process, freedom seems to be abridged individually, it is ultimately increased by being enlarged collectively. The individual gives up his lesser for a larger freedom.

IV

"No savage," says Sir John Lubbock, "is free. All over the world his daily life is regulated by a complicated and apparently most inconvenient set of customs as forcible as laws." This, I apprehend, was true not alone of primitive society, but continued even to the great era of the Greeks and later. Individual liberty as a fact or even as an ideal did not exist. "One peculiarity invariably distinguishes the infancy of societies," remarks Sir Henry Maine, "men are regarded and treated, not as individuals, but always as members of a

particular group . . . of an aristocracy or a democracy, of an order of patricians or of plebeians . . . or a caste; next he is a member of a gens, house, or clan; and, lastly, he is a member of a family." The concept of individual liberty in its personal and civil aspects dates quite late in the history of mankind; and even now we are not entirely clear as to what we mean by it.

No one appears to be able to discuss liberty, or at least the philosophy of it, without copious allusions to ancient Greece. Within the narrow limits of that little state, as Lecky so well says, arose "men who, in almost every conceivable form of genius . . . attained almost or altogether the highest limits of human perfection." I am inclined to concede the truth of this, and of Sir Henry Maine's dictum that in an intellectual sense nothing moves in this Western world which is not Greek in origin; and yet, as I scan the history of this marvellous people and the amazing contributions of their philosophers, especially Plato and Aristotle, I am always impressed with how much they have meant for liberty philosophically and how little practically, or historically, or institu-

tionally. In all their reasoning about freedom and about differences between the real and the apparent or about right and justice in the absolute and the relative, one may find vague forecastings of personal or political liberty as we now think of it, but little that bears on its development in the centuries to follow.

We speak of Athenian democracy and of the City States as a pure democracy in which individual and political liberty is supposed to have had its birth and to have approximated perfection, but as a matter of fact, individual liberty, as we think of it, did not exist there any more than it did in ancient Rome with all its pride of *Romanus sum.* At best even such political liberty as Greece knew applied to scarcely half of her people, while the "pure democracy" attributed to her was not at all democracy as the modern world knows it. Some writer, as I recall, referred to it as "a form of self-government gone mad."

The truth is, of course, that the organization of Greek society differed so radically from ours, that its ideals of liberty help us but little. Therefore, let us pass this period and much that the interven-

ing centuries suggest, to consider the much later era in which we find liberty struggling for expression in a social order definitely built upon a religious basis. To select this period is justifiable, I think, because it is the one which first begins to give unmistakable color to many of our own later ideas about liberty and law.

V

That religion, in all its varieties of aspiration and experience, has played a dominant part, as "the very breath of humanity," in every stage of history from primitive times to this hour is beyond question.

However, it was liberty in its inner rather than its outer aspects that intrigued men's minds and governed their actions.

Obviously, in a social order where men think more of personal salvation than of personal liberty and more of what their estate may be in the next world than in this, you would expect freedom, as an institution and in its individual aspects, to bear the mark of this point of view. To the people of

this period the rewards of life were in the life to come and were to be attained not by individual self-assertions but by self-abnegations and by obediences to the rule, precept and guidance of accepted religious doctrine and authority. Men thought of their human relationships or the status in which they happened to be born, as manifestations of the Divine Will, and whatever seemed customary and suitable to such status was regarded as right. The most realistic conflicts were not so much those between man and man as between the powers of light and darkness. Lucifer still walked the earth for the men of this era. The greatest sin was not one against society or your fellow man but one against a divine Providence which determined your good. Freedom of conduct could exist only within defined limits consonant with the will of God and the law of His Church on earth. The Puritan thought of his covenants of life and liberty as covenants with God, even though later they became the ethical basis of his covenants with man and the State.

If we cannot look to this period for guidance in determining the scope and province of modern

liberty, nevertheless we must credit this era with providing the soil and the fertilization needed for the germination of liberty as we were afterwards to know it. In spite of its disposition to regard all change as evidence of heresy, the era was nevertheless one of flux not unlike our own. Deep social and spiritual forces inherent in true freedom were moving. The era's bitter conflicts over matters nonmaterialistic, as, for example, over questions of theological doctrine, or between the "new learning" of the *humanists* and the "old learning" of the *scholastics*, were fermentations of growth and they are not without parallels now.

Properly to interpret, for example, a document of such supposedly nonreligious origin as the "Declaration of the Rights of Man," you must look to this religious period. It was the metaphysical thought of the theologians of this era, concerning questions like the freedom of the will, the nature of secular and divine law, the province of faith, grace, renunciation, responsibility, and the like, which gave form and substance to later political and economic thought. Their speculations and accepted doctrine, for example, about

freedom of the will or the nature of law and of ethics, set the pattern to which later thinking has adapted its ideas of liberty. And you can say the same, too, about law. To understand the origin of most of its current principles of penology, or its doctrines of penalties, punishment, intent, and responsibility, you really must look to the theological thinkers of this period.

In spite of all its religious fervor, its intolerances, its stakes and its faggots, the period was really one in which, due to a great activity and awakening, individual freedom took on new forms to fit changed conditions. Liberty of thought, after many a hard-fought battle, was winning out and demanding liberty of action. The ships of Columbus, the fall of Newton's apple, the telescope of Galileo, were changing the entire mediæval conception of the universe. Great personalities and great thinkers arose. The feudal system was collapsing. Aristocracies, around which the social system revolved, were becoming moribund and sterile. New forms of industry were arising. Religious and dynastic wars were demonstrating their inherent futilities. Thus, a multitude of

causes combined slowly to usher in a differently organized social order, in which men began to think more closely of the State and their relation to it and liberty forthwith took on new aspects. The "levellers" in Cromwell's army could now say "the poorest he that is in England hath a life to live as much as the greatest he; and a man is not bound to a government that he has not had a voice to put himself under." Men now began to think of individual liberty in political terms.

VI

In new ideas you will always find rudiments of the old. As the State, whatever its form, is essentially spiritual, it is natural that the religious ideas and impulses of the era we have been discussing should carry over and play a vital, though radically different, part in the political era which followed. The religious period had done its work and it was good work. If its ideas of freedom had more to do with inner than outer liberty, it was precisely such ideas that made later developments of individual liberty possible. For after all, it is

inner freedom that truly liberates and on which all outer freedom must build. This is what Goethe meant when he said "We must win our liberty afresh every day."

The political State may be regarded from many different angles: the historical, the sociological, the ethnical, the juristical and, even, the biological and psychological and it may be seen, too, from the socialistic, communistic, fascistic, and Hitleristic points of view. Truth may be visible from all these angles; but the tendency of most thinkers is to postulate an individual point of view and then proceed to reason from such postulations. Thinkers and jurists, especially, in the political period, did just that. Like most of us, they postulated their individual ideas of the nature of the State, of natural law, natural right, natural freedom, and of the nature of man, and, upon these postulates, built theories of law and liberty.

The point, however, is that this thinking and philosophizing about liberty and of man's relation to the political State and to society gradually penetrated, as it always does, into the general consciousness of the people, until freedom was thought

of as something definitely political or to be determined by political institutions. Men began to think of equality, for example, in a new way and to talk more about it as equality of opportunity and of industrial and political rights, than as equality in the sight of God. The sheer idea of rights as rights began to grip the public mind. The scope and limitation of government, its proper division of powers, and whether it should be one of laws or of men, became live issues. The social ferments now became almost entirely political. Democracy began to come into the ascendant, with its new ideals of equality and liberty; and its feeling that the way to freedom is the free progress of all through all under the leadership of all. A sort of divine sanction was assumed to reside in a numerical majority and all manner of natural rights were posited as the basis of individual and collective life.

The chief contribution of this period, however, is its new doctrine of equality, its faith in the complete freedom of the individual as a necessary law of progress, and its transformation of this faith into a polity. The ultimate test of political

action was supposed to be its effect on individual liberty.

For what liberty signified to a man of this political period, suppose we enter for a moment the Virginia House of Burgesses and ask of Patrick Henry just what he meant or thought he meant, when he cried "Give me liberty or give me death." To understand what he meant emotionally I fancy we should have to search into the heart of the American pioneer and read the long story of "a thousand battles on a thousand fields" by his progenitors on their ancestral soil. To interpret what he meant as a matter of rationalized conviction, we should have to turn, undoubtedly, to those seventeenth and eighteenth century thinkers to whom I have alluded. Like most reading men of his day, Patrick Henry probably philosophized about liberty in terms of Rousseau and of Locke, without recognizing their inherent contradictions. The one satisfied his instinctive pioneer feeling and the other his reasoned convictions. Subconsciously he undoubtedly felt that liberty was a "right of human nature" as "natural as the law of self-defense," for as he said in the first Continental

Congress, "We are in a state of nature, Sir!"

Consciously, of course, he was thinking only of political liberty. If he was ready to die rather than submit to what he regarded as arbitrary rule and oppression or interference, it was because he thought of political liberty as "natural liberty"; and "the natural liberty of man," says Locke, whose works were in every Virginia gentleman's library, "is to be free from any superior power on earth and not to be under the will or legislative authority of man, but to have only nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law but what the legislative power shall enact according to the trust put in it." Basic in those days to all conceptions of inalienable rights, even as they appear in our Declaration of Independence, was this prevailing notion of liberty as something "natural," indeed, as natural as Rousseau's hypothetical freedom of primitive man.

The truth probably is that what sets men like Patrick Henry and most of us on fire about what

we call love of liberty, is often a natural love of justice and a burning hatred of injustice, as, for example, when we see might calling itself right and doing wrong. Then, too, I imagine that in the case of this historic outcry, as in so many of our own outbursts about liberty, there enters quite as much of the element of sheer patriotism and love of native land as any passion for freedom as such. Every war ever fought professed to be a patriotic fight for liberty. While patriotism and liberty may be kin, let us not confuse them. Patriotism, for instance, can easily be and often is the enemy rather than the friend of freedom. Love of home and native land is, indeed, an impulse that liberates the spirit of man, yet the spirit of "my country right or wrong—but always my country," may not always do so. Here, however, we enter the field of ethics (and no doubt any truly philosophic treatment of liberty should take us into that field) for what are all our unethical acts, our hatreds, intolerances, injustices, conflicts, wars, but negations of liberty?

Patriotism may give liberty to a nation and it may also take it away. What, today, is all this

triumphant cult of each nation for itself, but a case of liberty become abortive and patriotism gone astray. I cannot stop to discuss this here, though it is germane to my theme, but I think this chauvinistic nationalism certainly abridges the liberties of man everywhere and in every nation more than it enlarges or protects them. It makes it difficult for any of us to enjoy both that inner and outer liberty which can spring alone from good neighborliness, mutual trusts and co-operation or the casting off of jealousies, suspicions, conflicts, and greeds.

I go farther and say that today the greatest menace liberty has to face, is precisely this spirit of excessive nationalism, call it patriotism or love of country or your country's freedom or what you will. It fosters hatreds and ambitions that are false and illusory and futile in every sense. It gives rise to new theories of the State, or revives old ones, like the Autarkie of the Nazis or the absolutism of the Russians, in all of which both liberty and patriotism, to say the least, put on strange, if not outworn garments.

We are apt to thrill to the idea of *Romanus*

sum or one hundred per cent Americanism, but it does not follow that this patriotic impulse establishes our own individual liberty or makes for that larger freedom which the centuries have labored to establish. Though one need not believe in Tennyson's "Parliament of Man and Federation of the World," or dream of swords beaten into plowshares, there should still be room for that greater loyalty to what President Wilson was so fond of calling "humanity," and which was the bed rock of his great vision of the "new freedom."

One reason, at least, why nations have so many absurd difficulties in conferring and co-operating for what is so clearly their common good, is that in their sovereign relations they still think and act politically in a world whose dominant needs have turned definitely social and economic. Mere political nationalism could never have upset the world as now. It is economic nationalism, expressing itself in the terms and spirit of a bygone political era, that is doing it.

The defense of political liberties, as men fought and died for them down to the days of Patrick

Henry, would really cause few conflicts between the nations of the Western world of today. With what looks like overwhelming evidence to the contrary, I make bold to say that wars of political conquest are a thing of the past. No nation envies another its liberty. Few, if any, of the wretched misunderstandings which militate so powerfully against international harmony arise from any serious fear that one nation will deprive another of its political freedom. What is feared is a disturbance of its economic liberty in the family of nations. The language and emotions of international discord and discussion still express themselves in political terms. It amounts to an anachronism. You have here a curious antinomy of the real and the ideal defeating the needs of both. The concepts of political equality in the family of nations, with their Byzantine notions of sovereignty, prevent those necessary sacrifices to concord and co-operation which our modern life requires, if real liberty is to be attained.

VII

Beginning with the earlier decades of the last century one notes a distinct change, especially in the English-speaking world, in what we may call dominant popular thought and feeling. Again we find liberty entering another distinct period of transition. Let us call it the economic period. The discussions of the forum remain political, but the centre of interest passes to the market place. Political ideals of liberty persist, but men find ever more difficulty in fitting them into the patterns of the economic order which is coming into being. They find that their relations have suddenly become more complex and interdependent; and that the sheer mechanics of living have made political equality of far less significance than economic equality.

The industrial era came on the world with such relative swiftness that we are just beginning to see how and why many of the principles of liberty, as the political era had formulated them, do not suit the economic era.

Adam Smith, as the putative forebear of all modern economic thought, claimed that his great contribution to the new science was based entirely on the moral and political foundations of what he calls "a simple system of natural liberty." By natural liberty he really meant political liberty. Under this simple system, if every one were equally free to exploit he was equally free to be exploited. Simple liberty could go no farther. The classical economists had no difficulty in finding "economic laws" to justify prevailing notions of political freedom and using them as foundations on which to build theories serviceable to economics as, for instance, the doctrines of freedom of competition and of contract. With this "simple system of natural liberty" and "the natural right of the individual," not to mention the moral law as eighteenth-century rationalism had handed it down, buttressing the "economic freedom" of the "economic man," it was inevitable that confused ideas of individual and collective liberty should develop and take on new meanings and should, also, play strange tricks and create fantastic fictions in the law.

The dominating philosophy of this era, as you know, was that of *laissez faire*, which it is well to remember was in essence a political doctrine, or, at least, was the logical result of trying to reconcile economic and political ideals of individual equality and liberty to the prevailing social polity. I think we may say that as a working philosophy it was not without beneficent results, though happily we now have largely lost faith in it. By stressing the factor of individual self-help and putting squarely upon every one the responsibility for his own fate, it laid the foundations for the doctrine of "rugged individualism" to which we no doubt owe much of our national progress. Its weakness lay in the fact that as a political creed of natural right or as a "simple system of natural liberty," it lent itself too readily to justifications of economic abuse. I have no sympathy whatsoever with the idea that society can proceed or liberty function on the principle of each man for himself and the devil take the hindmost. In one sense, however, individual liberty owes *laissez faire* something, if only because of the long battle it fought to distinguish between political and economic control in

the world of business; a battle to be sure which must again be fought under conditions which this old doctrine cannot possibly meet. It has done its work both for good and for evil. The first open rebellion, in the modern sense, against the right of the political State to interfere with industry and commerce began, we might say, with the Physiocrats. It took a long fight thereafter to establish the idea, still so prevalent, that individual liberty in commerce and industry is the true or only source and guaranty of national wealth and prosperity.

The trouble, of course, with the gospel of *laissez faire* is its ethical unsoundness. While it may have done good service in the cause of economic progress in a purely materialistic sense, we have found that it does no such service for justice or for liberty, as men like Carlyle and Ruskin vehemently insisted even in its earliest days.

The classical economists carried their political idea of individual liberty so far that it defeated itself. Bagehot says, somewhere, that every book on political economy he ever read always began with the hypothesis of two men cast upon an uninhabited island with each left free to fight for his

own welfare. This was "economic liberty." But men do not live in any such environment. They live in a world of human relationships. It was not long before the "economic man" began to feel that "economic freedom" did not result in individual liberty, and that under it the political equality of economic unequals was no equality at all. Men began to suspect that they might be passing from a political liberty which had crushed the old feudal order, into an economic liberty which was building a new feudalism.

It was some such continuing consciousness of the adverse impact of economic freedom upon individual liberty, as men through the ages have dreamed of it, that explains, far more than any mere humanitarianism or altruistic idealism, the never-ending attempts at reform during this economic period. But, note that down to and ending with what we hope marks the beginning of a new era, the means sought were always political. Given universal suffrage, free education, governmental regulation, and laws controlling competition, together with the supervising of activities "affected with a public interest," it was believed

that politics could thus preserve to us our larger liberties.

This process to be sure still goes on, but it enters into what I believe is a period in which a different and an immensely greater measure of individual liberty, differently conceived, is indicated and will be secured. If, in the economic era, we were all ultra-individualists, with even legal justice disposed to poke fun at "social justice," in the era we are now entering we discover, that so far as individual liberty goes, it may be achieved better by seeing ourselves more as parts of the social whole and of the social process than as free men on Bagehot's mythical island.

VIII

I hold to no doctrine of economic determinism in the sense that economic laws must work their sovereign will, but I am quite confident that any all-prevailing notions, howsoever right or wrong, as to the existence of such laws or as to their character, do determine the actual course and current of human liberty. If prevailing thought, for ex-

ample, accepts as a law of life Adam Smith's major premise of self-interest, or Bentham's idea of utilitarianism, or Roosevelt's doctrine of co-operation, the institutions of liberty will reflect such thinking. In every period of transformation we always see the development of popular feeling as to the right or wrong of this or that, until presently it becomes public opinion, the greatest of all transforming powers. Not only in a democracy like ours, but even in an "Autarkie" like Hitler's, all government is a reflection of prevailing popular thought. That the economic idea of free competition and the political idea of individual liberty as a law of life have played a tremendous part in the flow of progress in spite of whirlpools, eddies, and backwash, goes without saying, for they had the sanctions of popular faith. Our inquiry now is whether the public do not feel that many of those theories of liberty have had their day and must give way to something better?

What this may be I do not profess to know. To hazard a prediction presupposes a gift of prophecy I do not possess. However, now that the

economic system is so palpably out of balance or moving in so many vicious circles, we certainly see many evidences of the formulation of new ideals, in which the function of liberty takes on new aspects. Some of these creeds are radical, some reactionary, and some constructive. Some are based on the fallacious idea that there is no validity whatsoever in economic laws as experience and thought have formulated them, and others proceed on the theory that such laws are as fixed and immutable as any law of nature. Such a condition of conflict, when it permeates the mass mind, is always indicative of a period of change. How shall individual liberty fare in this new period? After winning our long fight for political liberty, the economic era has now disclosed that it was but a Pyrrhic victory for individual liberty, and that something more and better must follow. We see technical man utterly remaking the world of men. We see our economic era producing human relationships and results against which the public conscience begins to revolt. We see the wastages, absurdities, and injustices in foolish and irresponsible competition, in unbalanced production,

distribution and consumption, and in collective enterprise unplanned and uncontrolled. We grow acutely conscious of special injustice and the inequalities and arrogances of wealth, power, and opportunity. To economic determinists, like those of the school of Marx and their socialist offspring, all this presages the logical and predestined end of our economic system. To others, like the ultra-fascists, technocrats, and Utopians, it indicates the need of complete reconstruction, either from the bottom up or from the top down. Only the reckless, however, are prepared to ignore the laws of growth which have been formulated as a result of experience and years of trial and error. The "impatient school" of thought seems to be unconscious of the perils it would invite. Ours should be a reasoned course "looking before and after."

Mr. James Truslow Adams marshals a mass of startling evidence to prove that our present crisis is due to a breakdown in character. Doubtless "economic liberty," with its greeds, self-aggressions, profit complexes, and gospels of success, has led in that direction. I believe, however, that far more conclusive evidence could be adduced to prove that

such breakdown is more apparent than real. The character of America is sound at the core and is equal to any crisis. Think of how relatively free we are as a people, from hatred and intolerance, whether racial, political, or social. The outstanding feature of our national genius is its good will, and its ability to adjust itself to changing conditions.

Our economic evolution has steadily made for a more interdependent and co-operatively organized society. The drift of events is certain to make it still more so. How, in this increasingly relational order, shall man find freedom to live secure from the excessive self-assertions of his fellows?

To expect the government to do everything is, clearly, an abdication of freedom. Nevertheless, it is inescapable that government, to assure our liberties in terms of the public welfare, must exercise ever-increasing powers of social control; and if we are to protect liberty in terms of the individual, I am convinced, we must do it by more individual and collective effort within the social and economic process itself. I think it is the realization of this that explains our current de-

mands for self-regulation, codes of business conduct, and a "planned economy." Surely, the present crisis is not the result of the breakdown of character. Rather is it due to the failure of the various groups in the economic structure to function in terms of intelligent co-operation. Implicit therein lies a new concept of both individual and collective liberty.

Part Two

LIBERTY UNDER LAW

LIBERTY UNDER LAW

I

"The idea of freedom," says Oswald Spengler, "is one of the most important concepts ever formed by man"; and the history of the world, according to Hegel, is but the development of this idea. In our last lecture we considered the nature of this concept in general and its changing character from period to period in the life of man and the evolution of society. As we come now to consider its relation to law, it may be permissible to approach our problem by thinking first of liberty as a correlative of justice; and of law as protecting the one in terms of the other. Such an approach may be neither philosophically nor juristically correct, though I could draw on so great an authority as Kant for justification; but I think it is safe to say that the idea of freedom has played as great a part in the origins and primary substance of law as has that of justice. At least, the urge for liberty and justice stem from the same

spiritual root. Both can be thought of as primal human forces antecedent to and underlying any legal system. Before there was any legal system there was liberty and there was justice. Therefore, in a sense, it is permissible to say they were not the creatures but the creators of law. Certainly they must be thought of as the dominant, creative factors in the science of jurisprudence as it has grown in the past or is destined to develop in the future.

I doubt whether there has ever before been a period in which men have been quite so conscious of the impact of law and, at the same time, quite so indifferent to its meaning in terms of essential liberty. What should we have in mind when we think of law and of liberty, and demand that the one protect and respect the other? Thus, for instance, if a rugged individualism demands of law a recognition of a sort of rugged liberty, what, in such a case, is to be the test and to what extent and in what way should the law meet such demand? Are you to find the key to such problems in the nature of law itself or in a formal legal system or a rationalized science of jurisprudence?

Whenever the law, as one of its proper functions, undertakes to define rights and duties, what instinctive test is applied as measuring the validity of its effect upon liberty? Is it not simply some natural instinct of justice? It is in some such sense that I speak of liberty and justice as correlative. If liberty is to be protected by law, it is because simple human justice determines what "legal justice" must be.

There is a beautiful and moving passage from the pen of G. Lowes Dickinson which tells us "There is a fire that burns at the heart of the world. That fire kindles history. Natural facts, economic facts, instincts, needs, desires are the fuel it transmutes into a spiritual essence. Always, even in times called of peace, it is gnawing at the roots of society. For it is never satisfied; and one of its names is Justice. It is the greatest of all energies; and men of the world call it a dream."

But justice is far more than a dream. Like liberty it has entered into and determined those manifold equations of behavior called history. Its relations to liberty are evident if you note the similarity of their elemental or spiritual reactions.

Objectively, of course, we think of justice mostly as a function of law or as a measure of individual rights as between disputants. Subjectively we feel it to be something more, possibly Heaven-born or part of the eternal order, certainly something innate in the heart of us that works for self-realization as does freedom. You sense this relationship if you note, for example, that it is not justice in the abstract but injustice in the concrete that arouses our emotions and stirs our energies. La Rochefoucauld says, somewhat cynically, that, "our love of justice is simply our fear of suffering injustice." But, in truth, what moves our feelings and arouses us to action in any given case of injustice is a resentment against what, at heart, we feel is an invasion of liberty. If injustice be done to another we feel that violence has been wrought not alone upon another's essential freedom and inner integrity, but upon our own as well. Thus, it can be argued that the present urge for greater "social justice" or "industrial righteousness" springs not from any increasing devotion to justice as such, or from any rationalized desire to make the world better, but is due rather to an

increasing consciousness of palpable injustices and to that spiritual fire which flames up in us when we see how these injustices infringe the liberty of our fellow mortals.

Due to such instinctive and spiritual reactions, justice and liberty take on a sort of dual aspect which makes for confusion in our ideas of law. Thinking of justice in terms of law we think of it as an institution or an objective reality. "Justice is what is established," says Pascal, speaking, to be sure, of legal justice. In the same sense we often think of "natural justice" as if it, too, were established or were something extra-human. To my way of thinking we shall better understand the essential nature of law and its possibilities of growth, if we think of justice as an elemental "fire that burns at the heart of the world" rather than as an institution. As early as Aristotle, thinkers distinguished between "natural and conventional justice," just as we now make classifications like "judicial justice," "executive justice," "administrative justice," "social justice," and "justice outside the law." But what, in all these categories, shall be the measure of liberty? Shall

it be might, authority, reason, or what? According to Justinian's famous definition, "Justice is the set and constant purpose to render every man his due." But how determine what are your dues or mine, in all the varied conflicts and relationships of life?

That justice in many large fields operates outside the law is, of course, obvious. We may well ask ourselves whether, indeed, the greater enlargements of liberty do not lie in protecting these very areas. If, for instance, we are to secure that larger individual freedom implicit in greater social justice must we look only to law as supplying our means to that end? Cannot society evolve, and is it not in fact now evolving, other instrumentalities aside from the law for achieving fundamental justice and, thereby, enlarging liberty?

Even though justice, like liberty, be a primal force, it obviously is not self-executing. It must operate in the world of human relationships which give rise to law and which, indeed, are the warp and woof of every legal system. Granted that there are large realms outside the law in which so-called "natural justice" alone may protect our liberty,

there are far larger areas in which this is not the case. Here rights and duties must be defined and some authority set up to do so, if either justice or liberty is to prevail. It becomes necessary, as Hobbes puts it, to establish "some common measure of all things that might fall in controversy; as, for example, of what is to be called right, what much, what little, what *meum* and *tuum*." Superstition, fear, taboo, custom, experience, or reason may determine what this measure is to be, but these are all forms and measures of authority; and with authority inevitably comes a legal system with its complex problems.

"Justice," says Pascal, "is subject to dispute. Might easily is recognized and is not disputed. Thus, it is not possible to attribute might to justice, because might has often contradicted justice and said that it was itself just. And, thus, not being able to make what was just strong, what was strong has been made just." Implicit in this somewhat cynical analysis is a conception of right and justice as absolutes. In any case it is between might and right that liberty, in both its positive and negative aspects, fights its eternal battle.

II

I cannot take you into the fascinating field of the origin, nature, or content of rights even though they are, indeed, the core and essence of our problem. Neither, in this limited discussion, can we pause to consider the nature of law, with its congeries of rights, duties, and remedies or those cardinal functions which have to do with peace, order, security, stability, certainty, or the means and methods by which it secures them. Thinking of law only in its relation to liberty, is it not evident that the gist of our problem is to make up our minds as to how might and authority should be defined and controlled so that they may not be arbitrary or static or unresponsive to human need, or out of harmony with the tune and rhythm of collective life in a given time and place? We must ask ourselves to what extent any system of law can assert positive principles of compulsion asserting that this and this only is eternal or absolute right and that any violation of it is a negation of justice and of liberty. The sanctions underlying any right cannot be found in the right

per se, but in the human need and desire for its recognition and enforcement. Therefore, must we not think of law as a distinctively human institution and itself as subject to modification as are all things human? We have seen how, in that ebb and flow of eternal change which constitutes life, man must deal with the recurring need of adaptation. The very essence of liberty consists in his untrammelled freedom to meet that need; and it is one of law's obligations not to thwart such freedom of adjustment.

To most of us rights are rights, and we are sure that here, as in our conception of justice or liberty, we need no learned philosophers to tell us what they are. But this simply means that we really do not think of rights intrinsically at all. We are merely expressing an instinctive reaction against being deprived of freedom to determine for ourselves just what they are or what we think they are. Most of the sacrifices in the cause of liberty have been in struggles for the right to have rights, quite as much as for any given right *per se*. What are these rights for which men seem so ready to die? When you stop to analyze the simplest of

them, you instantly find yourself involved in a maze of elements and factors—ethical, political, racial, and emotional. Each right, when analyzed, reveals itself as a "bundle of rights"; and this is equally so of those co-ordinates we call duties. Thus, from neither the human nor the juristic aspect can either rights or duties be regarded as absolutes. In reality they are but socially accepted definitions and functions of constantly changing human relationships.

No doubt when we think of rights in general or in terms of liberty or of justice, most of us unconsciously think of them as some sort of "natural rights." This conception of rights and liberty and justice, as springing, so to speak, from nature and as supreme and fixed, has been a constant factor in the development of law and has, also, been a source of no little confusion of thought. Most lay criticism of law, and especially "new law," reveals this traditional notion of some "natural law" operating in the realm of morals, much as physical law operates in the world of nature. "These natural rights of mankind," says

Blackstone, ". . . may be reduced to three principal or primary articles: the right of personal security, the right of personal liberty, and the right of private property; because, as there is no known method of compulsion, or of abridging man's natural free will, but by an infringement or denunciation of one or other of those important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense."

This idea of natural law, which is as ancient as the beginning of almost every historic legal system, or, at least, is as old as the early Stoic philosophers, may have been the source of much confused thinking, but it has undoubtedly done much for the cause of human liberty and still has a certain pragmatic validity, as has, also, the idea of law as a divine revelation. From primitive times, man has felt the need of some definition of right as the determinant of might; and has sought for it in some divine fountain-head from which it flowed, as from the will of whatever gods there were: the

Sun God of Hammurabi, the Jehovah of Moses, the apostolic revelations of the "new dispensation," and so on through the centuries with their cognate notions of the divinity of kingship or the king as "animate law," to the *vox populi vox dei* of our own day. Some dim belief or vague idea of law as "the breath of God," or as a transcendental force, or, in Mr. Justice Holmes' phrase, as "a brooding omnipresence in the sky," persists in all of us. We may concede a certain spiritual validity to this ingrained faith in the eternal character of law and of rights, but in the world of reality we are compelled to see them not as "natural" in the Blackstonian sense, but as relative, changeable, functional, and human. Men's impulses, desires, activities, claims, and conflicts all inter-lock and over-lap and call for harmonizing, reconciling, adjusting and controlling, if liberty is to be secure; and to do this is the province and function of every legal system. Ideas and ideals of right and, therefore, rights themselves change; and the law must meet and validate them. The star of justice is a variable one.

III

I asked you to think of liberty as a correlative of justice and of justice as both an instinct and an institution. I wished to stress the point that in any epoch of change this instinct is a more important factor in determining the relation of law and liberty than is the formal substance of any legal system. If, for example, the world actually is moving towards greater socialization in all its varied aspects, or if we are in fact entering an era of conscious social planning, then obviously the individual and his liberty face a new orientation. The strength and vividness of the instinct for justice and liberty will determine their range and scope under the law.

Hard and fast principles of law have been laid down in one period only to find that time and circumstances have played havoc with their immutability. Thus, we find such persistent doctrines as those of "natural law," or the human and divine aspect of law, or "law as reason" undergoing constant transformations during the very

periods within which they are still accepted as orthodox. Amidst all changes, however, there is always the one constant idea that between law and liberty there is some fundamental relationship. It was part of Locke's doctrine of freedom that there was such an inherent duality between liberty and law, that it became a necessary function of the latter not only to protect, but also to direct the former. Where there is no law he thought there could be no freedom, "for freedom and law are strictly correlative." So, too, we find Pitt saying "where law ends tyranny begins." The same notion, of course, is implicit in Hobbes and his school. But what after all is law? And what freedom? That is the question which the centuries have sought to answer and the answer has changed with the centuries.

IV

As the era which found society organized on a religious basis merged into one in which the social order became political, men's ideas and ideals of liberty underwent marked alteration. The same

is true of law; though undoubtedly the juristic thinking of the theologians of the religious period played an important part in all later legal thought and doctrine.

With the seventeenth and eighteenth centuries, you recall, there began the transition to the political concept of individual liberty. Jurists now began to assert that reason was the supreme test, and professed to find in it the validities which the religious period had found in faith. The rise of this new doctrine parallels the rise of the individual's social discovery of himself as an individual. *Homo Sapiens* was assumed to be a reasoning animal whose actions are governed by rational considerations. His individual concepts of right and of liberty were assumed to be valid *per se* and to be eternally correct if they conformed to reason.

To find a basis for the *a priori* character of such conclusions, the English jurists and thinkers, with their eyes on the writings of Grotius and other continental publicists, talked about "the law of reason and the law of God" and built up theories of "natural rights" and a new form of "natural law," which they looked upon not, per-

haps, as incarnations of the moral law or as revelations of the will of God, but certainly as revelations and proofs of the supremacy of natural reason, as bestowed on man by God. "The law of nature," we are told in *Doctor and Student*, "is also called the law of reason." Englishmen spoke of the "common law as natural law and natural reason applied to the state and condition of society." They thought of reason as the very heart and perfection of law. Indeed, they went further, and, just as the ancient Greeks had come to think of their own customs and rules of law as so completely the perfection of reason that even the Gods couldn't change them, so, in the same way, the men of England, by looking upon their own customs and immemorial rights as the perfection of "natural reason," came presently to regard these customary rights as natural rights.

The fundamental juristic idea of the period was that true definitions and delimitations of individual right and individual liberty were fixed by reason and demonstrable by it, and that the existence of a universal law of freedom could be established on such a basis. Law now began to

claim that it was both reason and the perfection of reason. Natural reason and law were spoken of as if they were synonymous; and presently came "juristic reason" as having special validities of its own.

The historic conflicts between court and crown in this period reflect these contentions and speculations. Moreover, the law was regarded as a system which only trained minds could interpret or define. "My Lords," exclaimed James I, "I have heard the boast that your English law was founded upon reason. If that be so why have not I and others reason as well as your Judges?" To which Coke answered, "that true it is that God had endowed your Majesty with excellent science and great gifts of nature; but your Majesty . . . is not learned in the laws of the realm of England; and causes which concern the life, or inheritance, or goods or fortunes of your subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it."

This idea of "artificial reason and judgment"

accounts for many of the historic developments as well as for many popular misconceptions of law, such as those about the difference between "fundamental law," "natural law," and "legislative and judge made law." The eighteenth century expected too much of human reason or, at least, carried its faith too far. It came to regard both reason itself and this "artificial reason" of the law as having something of the same unimpeachable validity that geometricians attach to their Euclidian axioms. Unfortunately life is but a calculus of approximations and, at best, is never any too rational. To fit the dynamic world of today, law cannot be static or artificial, or be thought of as the revelation or will of some natural sovereign. Neither can we think of it as the perfection of human reason.

The letter of the law, even the text of any written Constitution, is dead unless it conforms to the needs of living men. "The letter killeth but the spirit giveth life." If, for instance, the law, today, often seems helpless in the presence of exigent social facts, is it not because of the persistence of the idea that the "law as reason" com-

pels a logical consistency that defeats justice itself? Legal reason and accepted principle, for example, properly insist on equality of individual rights. Conceptually the principle is unassailable. Actually the law, as reason, with logical consistency can negative these rights and render them sterile.

Anatole France, speaking with fine irony, says:

"Our law, in majestic equality, protects the rich no less than the poor in their right to beg on the streets." You will recall the logical application of the law as reason in that equally ironical pronouncement of Justice Maule's which led to the reform of English divorce laws, when he said to the unsuccessful plaintiff: ". . . It is true that the course you should legally have taken would have cost you many hundreds of pounds, whilst probably you have not that many pence. But the law knows no distinction between rich and poor."

Law, as the reasoning of philosophers would have it, has rarely been good law. It does not root in the real soil of life. The law of the fathers, of tradition, heritage, custom, experience, has an intrinsic validity which the law of man's reasoning

rarely has. It is precisely this fact which paradoxically enough makes and compels progress in the law. For, of course, law does progress and change, as does life. We are constantly creating new law, even in its most organic sense, and making fresh adaptations of old law. Rationalizations about law and liberty by men like Kant and Hegel, or the English thinkers of the eighteenth and nineteenth centuries, unquestionably exerted a profound influence in the realm of juristic theory and, also, in that of legislation and judicial decision. But, however logical and coherent their theories may have been, the development of law did not proceed and never proceeds logically and coherently. It is not wise to put too much faith in fixed reason. Every development has its own logic and its own momentum. Even in this early period, though law, in theory, was supposed to be the perfection of reason and analogous to the law of God, in practice its theoretical precision and certainty constantly yielded to varying interpretations and applications.

V

If we had time to show how liberty fared in specific instances, during this era of law as the substance of transcendental reason, we should find that it often fared none too well; and that the logical application of law as reason had revealed it frequently led to violations of human freedom as we now think of it. However, such results were not supposed to be the fault of the law, for reason had made such abridgments logical and inevitable and, therefore, right. Indeed, this idea still retains much vitality.

Based upon the belief that law and reason are one, the next development, as we come to the century from which we drew so many of our own notions of the nature of both liberty and law, was the idea that its rules and principles and, indeed, the entire living body of the law, which reason had thus revealed, could and should be incorporated in fixed codes, exhaustively complete for all time, and containing within themselves in advance, so to speak, the necessary elements of de-

cision for every conceivable future conflict involving man's rights or liberties. Thus, judges might only declare and never make the law; and the government might be one of laws and not of men. To maintain individual rights and personal liberty, and to give security to the social order, checks and balances and a certain rigidity of law duly embodied in written covenants came to be regarded by thinkers and public opinion alike as a necessary condition.

VI

The eighteenth century, as you know, was a period of advancing enlightenment and altruistic fervor for individual and political improvement, with all sorts of ideals and counsels of human perfection. Apparently, men had complete confidence in their ability to lay down a Bill of Rights defining and declaring the rational limits of all governmental or jural interference with liberty—much as an absolute monarch might grant a constitution declaring what he ought not to do and hence would not do. This fixity of law was believed

to be the condition precedent to the maintenance of political liberty. It was the keynote of the period. During this time most of our institutions took form and shape.

Our early legal and political history is replete with conflict over the issue of the fixity as contrasted with the free construction of the *lex scripta* in general and our own Constitutions in particular. We soon discovered that our theories of immutable principles and abstract rights, however logically consistent or historically respectable, did not serve our needs or fit our practices. To meet this difficulty we have always adopted some sort of euphemism, as Jevons puts it, to maintain the fiction of universality. When the fixed principle failed to hold good we evolved a special theory, or said the case was exceptional. "It is a general principle, for example, that a man may do as he likes with his own property. It is an exception when a railroad takes forcible possession of his land." The truth is that this whole matter is such a complex calculus of good and evil, of relations and duties, that all legislation and most rules of law are inherently experimental. Nothing, for in-

stance, could have been more experimental than our own Constitution. It was so regarded by its makers; though to be sure we do not seem to feel that way about it. With us, few things are more sacred. We instinctively rebel against any changes in it, even if, at the same time, we constantly demand them and make them.

This feeling, I think we may say, is a survival of the eighteenth-century faith in the ability of reason to formulate a charter that will forever define and protect our liberty. This faith may be carried too far. Jefferson saw this clearly and, in a letter to Madison in 1789, said: "The earth belongs in usufruct to the living, . . . no society can make a perpetual constitution or even a perpetual law. The earth belongs always to the living generation." He thought, therefore, that every constitution and every law should expire at the end of nineteen years.

And, let me say that however *sacrosanct* we may feel the Constitution to be, our treatment of it from its incipiency has rather belied that feeling. We have always treated it as a charter of life instead of one of absolutism; and have demanded

that the courts do so—which, by and large, they have done. The Constitution has "marched." It has always lent itself to experiment and has served to meet the needs of the times as those needs have developed—and it will do so now. "The Constitution," says Mr. Justice Holmes, "is an experiment," or, in his later phrase, "it has to take some chances."

This certainly is the spirit in which the founders adopted it. Some foreign critic has said that much of our reverence for the Constitution is due to our looking at it historically and thinking of it only in terms of the past, thus "completely overlooking present-day fact and phenomena."

Many people are convinced that we are devitalizing this great charter and are thereby destroying our civil liberties. Indeed, in some instances they gloomily forecast a complete breakdown of our constitutional system. These pessimistic forebodings have their origin in the eighteenth-century conception of the irrepealability of law as revealed by reason and fixed, for all time, in a fundamental chart.

Concede the validity of the eighteenth-century

premise on which these present-day critics proceed, and their logic may largely justify their conclusions. But, surely, life is more essential than consistency. It is quite possible to apply such fixed ideas to contractual obligations, or to due process of law and the like, as to check the organic growth of society and shut the door on insurgent life, with its unceasing flux and flow.

Something like this, I take it, is what Mr. Justice Holmes meant by that "inarticulate premise" which ultra-individualism so often ignores in its consideration of law and of the Constitution. "The language of judicial decision," he says, "is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty, generally, is an illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to relative worth and importance of competing legislative grounds. . . . You can give *any* conclusion a logical form. . . . To rest upon a formula is a slumber that, prolonged, means death." Nevertheless, what looks like the immediately good and, therefore, right may easily

prove to be ultimately and collectively wrong. It is here that law as the rule of reason and the Constitution in letter and spirit must supply proper guidance. But we should not unduly fear or resist social experiment. "There is nothing," if I may once more quote Mr. Justice Holmes, "I more deprecate than the use of the 14th Amendment, beyond the absolute compulsion of its words, to prevent the making of social experiments that an important part of the community desires. It is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness."

The increasingly relational character of society obviously is compelling us, if we would attain a true measure of social or individual justice and liberty, to attach a public interest to activities which heretofore we have regarded as purely private. Mr. Justice Roberts, in the recent milk case (March 5, 1934), declared that: "Subject only to constitutional restraint the private right must yield to the public need.

"The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State ac-

tion, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." In the same case, when it was decided by the Court of Appeals of the State of New York, Chief Judge Pound trenchantly stated that "Constitutional law is a progressive science."

VII

To understand the eighteenth-century faith in charts and reason, we must remember that we are dealing with an era in which political liberty had come to be uppermost in men's minds as the measure of freedom and the good life. As the modern economic world began to come into being, this political concept was not all-sufficient, no matter

how valiantly juristic thinking strove to make it so. It might serve if the law postulated an abstract political man, just as the next century came in a way to postulate an abstract "economic man." But man is neither a political nor an economic abstraction, and consequently the eighteenth-century charts of reason, Bills of Rights, and even written constitutions promised more than they could fulfill and, also, stood in the way of progress and of true liberty. It is not easy for us to admit this even now, for if there is one thing we think we want more than any other it is a legal system that is fixed and a Bill of Rights that is impregnable and a government that is one of laws and not of men. "Hearken, O Israel, unto the statutes and unto the judgments . . . ye shall not add unto the word which I command you, neither shall ye diminish from it." Or hearken to the Puritan's demand for "Something fundamental . . . somewhat like a magna charta which should be standing and be unalterable."

This idea of supreme law formulated in a Bill of Rights was certainly in entire accord with eighteenth-century Puritan thought and spirit.

Just as the Puritan believed in a rigid and hard Cromwellian morality as the means of achieving necessary form and order in social relations, so he naturally carried a similar faith over into law. He wanted it fixed for all time. He even felt that way about economic law. He conceived of law as a sort of supreme reason which guided his individual conscience and also his relational life. Ethics, right, and law, born of reason and of revelation and conceived as fixed and finished according to the covenants of God and of men, were to control both him and his magistrates and thus make secure and inviolate his liberty.

The fundamental proposition, says Dean Pound, from which the Puritan proceeded, was that "man was a free moral agent with power to choose what he would do and with a responsibility coincident with that power. Hence, he put individual conscience and individual judgment in the first place. He believed that no authority should coerce them, but that every one must assume and abide the consequences of the choice he was free to make. His principle of consociation rather than subordination demanded that a fixed, absolute, uni-

versal rule, which the individual had contracted to abide, be resorted to—not the will or discretion of the magistrate. It demanded that the State and the law interfere after action, but not before. It demanded judicial imposition of penalties upon one who had wilfully chosen the wrong course, not administrative compulsion to take the right course. Hence our policy developed an inconsistency that is part of the Puritan character. He rebelled against control of his will by State or Magistrate, yet he loved to lay down rules, since he believed in the intrinsic sinfulness of human nature. In the same way we have devoted our whole energies to legislative and judicial lawmaking. At the same time the enforcing agencies, both administrative and judicial, have not been merely neglected, they have been deliberately hampered, lest they interfere unduly with the individual free will."

The influence of Puritan ideas and spirit upon our law and legislation has, of course, been very great. It injected into law ethical and moral values which have been of large import, even if, also, they have been a source of confusion and con-

flict. We are apt to misinterpret Puritanism if we think of it merely as a religious phenomenon. It was in fact far more a social and political one—even though its religious impulses gave form and substance to most of its ideas and theories about personal and civil liberty. In a way, it is the sociological aspect, so to speak, of Puritanism which has most to teach us. Note how naturally the Puritan spirit synchronized with the political and capitalistic order that was coming into existence at the time of its predominance. What, for example, could fit the rising economic order better than the Puritan gospels of the sanctity of work, thrift, and abstemiousness, or its insistence on personal character and personal virtues?

Imagine, for instance, what a different world this would now be and how different would be our very idea of liberty and of law, if, in the struggle between Cavalier and Puritan, the former had prevailed. In that event we probably should not find ourselves wrestling with the existing problem of what to do with leisure, which in essence means what to do with life and with its inner liberties. The Puritan idea that to work is to pray and that

work is the purpose of life undoubtedly helped make our material progress, but, perhaps, in the equation of life and liberty, work is not everything. Count Keyserling, I note, insists that Puritanism made America what it is and is still its most vital force, but laments that it has prevented the growth of that higher liberty which is to be found only in the joy of living. "There is no real joy," says he, "in American life; that is, no joy like that known to antique Pagans and European Christians and Confucians and Hindu Bhaktas. There are contentment and what one calls the 'good life' and the kind of brightness which is the natural result of good-will and kindliness; but real joy is lacking."

VIII

As we pass from the eighteenth into the nineteenth century we begin to see evidences of a somewhat wavering faith in fixed law and an increasing demand for a greater flexibility. With these came also modified notions as to the nature of law itself. Juristic thinking began to assume that even

though one could not think of law exactly as "natural law," nevertheless it was possible to take certain principles revealed by nature and by reason and, through purely logical processes, deduce from them fixed rules of law capable of universal application. We began now to have what has been called a jurisprudence of conceptions. One notes more than ever much confusion and a new order of thought as to the nature of law and of individual rights and liberty. "Natural rights" are spoken of as springing from natural freedom (whatever that may be), but "legal rights" are said to spring from positive law—the law of the sovereign, the law of the land, the common law.

The theoretic basis of legislation and legal interpretation in this period is made to rest upon the supposed sanctity of the individual's freedom and his right of self-assertion. New legal concepts of individual liberty become actual and implicit. The law's problem is looked upon as one of protecting and achieving this liberty by finding a way of reconciling conflicting expressions of free will. Metaphysicians like Kant, Bentham, Mills, Spencer, and others gave this new concept of liberty

under law a philosophic basis, which had pronounced and still continuing effects on all theories of law and of legislation. It was the German philosopher Kant, and to a degree Hegel, who set the style of metaphysical approach to the nature of rights, reason, and liberty, but the men whose thought exerted the most practical influence, I think, were Mills and Spencer. The latter's reasoning especially satisfied the economic realism of the time, and his philosophy of individualism became the substantial basis of most later notions about individual liberty and its relation to law. Mr. Justice Holmes could well ask whether we were to assume that Spencer's "Social Statics" was to be regarded as part of our organic law.

Underlying these conceptions of a rationalistic sanction for individual liberty was the idea that the interests of the individual and of society as a whole were coincident. This was the essence of Utilitarianism, as it had come down through Hobbes, Hume, Bentham, and others, and according to which the aim of law as of life should be to promote the greatest good or, in Priestley's phrase, "the greatest happiness of the greatest

number." The test of this greatest good was utility—a utility which the economic age construed largely as material. This, in any case, was to be attained by the maximum of individual liberty—and the function of law was to protect this maximum. Individuals were looked upon as free and separate persons each of whom, in his own way, must work out his own destiny. It was assumed that by being free to do so, he would thus work out the greatest good of all and contribute to a true public welfare. The social whole was but the sum of its parts. The liberties of men were secured and the province of law was fulfilled, therefore, if the legal system saw to it that the liberty of each was limited only by the like liberty of all. This was to be accomplished, according to Spencer, by insisting that "every man is free to do that which he wills provided he infringes not the equal liberty of any other man."

This, to be sure, is still the accepted doctrine of the average man, so far as he has any conscious doctrine at all, as you can see from most of the current criticism of recent legislation. It is, also, the conscious or subconscious view of lawyers gen-

erally, and especially of those preceding the present generation. Mr. Root, for example, writing of Herbert Spencer, says: "He tested all laws which limited the freedom of the individual by the question whether those laws were necessary to maintain the equal freedom of others. Many of us, I think most of us in America, believe that to be the true principle, the only principle, upon which political ethics can rest securely, and we cannot afford to have our belief become a dead and forgotten faith."

IX

The question I am submitting to you now is whether the logic of life is not compelling us to modify this faith in the inherent ability and benevolence of the individual and to call upon the law for different interpretations. Is it not possible that a larger measure of liberty is attainable for the individual if he sacrifice some of his rights of self-assertion in the interest of society as a whole? In fact, does not the effort which modern society is now making to meet its palpable defects compel

us to assume that law and liberty necessarily face a new orientation?

Absolute individualists like Spencer, as also the more practical and utilitarian ones like Mills, believed, with Sir Henry Maine, that society "with varying degrees of celerity" was moving, or, as they put it, was "progressing" from status to contract. This notion, on which is based our own faith, for example, in liberty of contract as an essential of freedom and material progress, has been a cardinal theory in our law. As illustrating how the logical application of free contract carries us to results which do not fit the world of today, we need only read Spencer himself and see how vehemently, and yet logically, he opposes, as infringements of free contract and individual liberty, many varieties of legislation which every one now accepts as necessary and desirable. Thus, we find him opposing mine and factory regulations, gas-work inspections, compulsory sanitary acts, rules prescribing the number of lifeboats, taxation for local drainage, and the like.

It is quite possible that with our present ideas of collective liberties and our passion for social

justice we may carry our indifference to these traditional conceptions of law and individual liberty too far and demand that the law concede more than it should.

Nevertheless, in the wide field of social, political, and economic readjustments, the law must play its part in the protection of liberty; and it does so with far greater success than its critics realize. But, it is not necessary that we should think of law as liberty's only safeguard. The protections of free initiative, for instance, are of the essence of individual liberty, but to secure these the law can often see both liberty and the individual too abstractly where other forms of protection can deal with them more concretely and more effectively. Despite certain current doubts as to the value or the outcome of "planned economy," "economic statesmanship," "self-government in business," "voluntary covenants," or "codes," they, as well as law, can be ways and means of achieving and protecting liberty. The centuries I have named have much to teach us about law and liberty, and their teachings should ever abide with us, but, after all, this is a new world we in-

habit and the law must recognize that it is not necessarily the only agency of justice.

X

I have tried to show, in this very cursory survey of law as a social institution, how juristic theories reflect whatever may be the prevailing thought processes of the time. I wished, also, to suggest how prevailing ideas of law have in themselves, as sheer ideas, always had a pronounced effect on the essential character of the social order and of the individual's notions of his relations to it. In a social order, for example, which thinks of law as the will of God, the individual easily tends to give a divine sanction to the dictates of his own will and his own desires for self-assertion. With law thought of as emanating from King or Sovereign, caprice and tyranny easily become accepted measures of freedom.

If, now, we ask ourselves just what continuing factor determines the nature of man's concept of freedom, is it not reasonably safe to say that it is such general sense of justice as prevails in time

and place? Do we not all think of individual liberty as though it were a correlative of individual justice? If, as I contend, new relations of liberty to law are in the making, may not these be defined by such prevailing ideals as we may have of what is justice rather than by any fixed ideas we may have as to liberty?

Mr. Carter, an eminent leader of the Bar, declares that Justice "To some has seemed to import a sublime attribute, almost an emanation, as it were, from the Deity, recognizable by an innate moral sense. Some regard it as scarcely more than a synonymous expression of what is right or ought to be done. But the attempt to form a conception of some absolute attribute which would properly be named justice is an abortive one. All we know is that certain acts are called just and we feel them to be just. . . . Justice, in its primary signification, comes into play only in respect to that part of the conduct of an individual in which others are concerned. . . . Justice and law are equivalent words. . . . Justice considered as a sentiment is the sense of what ought to be done by one to another and this is necessarily what one

might fairly expect from another, that is, what is customarily done, for no one would think it justice to require from one anything not in accordance with custom. . . . What is it that gives to the word justice its deep and august significance—its supremacy among moral sentiments? I think a sufficient answer to this question is found in what I have said of the true nature of custom."

Many of us do not entirely accept Mr. Carter's theories of the origin and nature of law. It is not necessary to think of the custom which thus makes and changes law as something against which the memory of man runneth not to the contrary. Customs are ever making and re-making. They can be extremely young and yet extraordinarily vital. "The old can be new and the new old." Patient time toils slowly on, but man can change his ideals and his opinions and give them the transforming power which Mr. Carter attaches to what he calls custom.

What gives form to our ideas of justice and ultimately of law and liberty, according to my view, is not merely conscious thought, nor human law making, nor formal theory of reason or of

logic, nor racial or social inheritances or survivals, but also, and perhaps predominantly, our common "state of mind," our "communal accords," our "ruling public opinion." If these conform to the traditional which is in all of us and to the dominant way of common thought and feeling, they can have all the force and effect of custom. In every period of history some such ruling passions reshape ideas of justice and become the focus of action and of changing law. Theories of right become deductions from such prevailing spirit, and every jural system builds on some such foundation. Grant new ideals of liberty or of association or co-operation, or of life, and law finds a way to realize them. A sound legal order is never the creator but always the product of these ideas and ideals, and the ultimate test of such order is the manner and extent to which it serves the cause of liberty.

My contention is that once more ways of common thought and feeling are laying new conceptual foundations of justice and are seeking for and evolving means for their realization in the legal and social order. I say this not merely be-

cause of the recognized need of restoring our economic balance or of reviving prosperity, but because the necessities of modern life drive that way.

The individual, of course, is, and probably ever will be, the unit of society, and his freedom of action is the centre around which any sound legal system must revolve. In law, as in government, the problem is to see that his energies are not chilled but, rather, are released and protected. Are we not coming to realize that this maximum of freedom cannot necessarily be achieved by assertions of that "rugged individualism" which may have suited the days of our economic adolescence? Granted that this is so, nevertheless, it is not necessary to wreck or, even, essentially change the economic order. Is not there a chance for a larger and more satisfactory freedom within that order, if the law will permit ideals of subordination for a common end to have their full sweep?

Such ideals, I think, are forming. Consider for instance the significance of the fact that people so frequently speak (almost in the language of Ruskin) about a "just price," the "just" rights of classes as distinguished from individuals, and the

"just rights" of labor, of capital, of the rich and the poor. Business "codes," voluntary covenants and the N. R. A., in their cardinal aim and philosophy, are but efforts for a more realistic justice even though they seem to run counter to traditional theories of individual self-assertion and liberty. The object, as well as the logical result of all these efforts, is not to check free enterprise or individual liberty, but to make them realities instead of abstractions. True, you may have to persuade the recalcitrant or establish leadership for the halt and the blind, but such urgency as there may be, need not appear in terms of arbitrary power. It can also be seen as a fresh concept of liberty seeking realization.

XI

Clearly, we are beginning to think of liberty more in terms of social than of political right. We are revising our ideas of free competition, and the relations between production and consumption, agriculture and industry, life and material suc-

cess. Under the urge of social necessity and the instinctive desire to preserve the existing economic order, we are modifying our individualistic ideas of the nature and sanctity of profits. We are rebelling against the brute power of money and at some of its unjustifiable privileges. We resent the inequalities of distribution and control. We recognize that large areas of "private business" are "affected with a public interest." And we realize that the bridging of the chasm between money and property is more a social than an individual function.

We are even coming to regard private property itself in new ways. We think of it, shall I say, not purely as a right of absolute individual ownership but as impressed with something of both a moral and a social trust. I said earlier that any sound discussion of the nature of liberty carried us into the domain of ethics, and in all these manifestations of the new spirit you will observe a new ethical note. Reformers and liberals have always been emphatic for ethical values, but heretofore mostly in their political aspects. Now the emphasis is on the ethical aspects of the economic and

social, with inevitable repercussions upon the legal.

Even those who condemn the existing order out of hand, or those scorners and murmurers who see nothing ahead but disaster, seem to be but confirming the contention that new ideas of justice are unfolding. Still others, impressed with the greed, corruption, and ignorance prevalent in modern society, and acutely conscious of that infinite variety of human wrongs to which the world has always been a victim, come to think that our whole structure must be interpreted as if it were the product only of injustice and unreason. Thus, looking at an institution, say, like capitalism, or even at democracy itself, they judge and prejudge it and forecast its doom.

Some would build the future only upon the past. Others would "remould it to the heart's desire." Rationalists see our world from one point of view, fundamentalists from another; but life jogs on. In any event I regard all these gospels of despair and of revolt, and these fermentations of both the intelligentsia and the industrial Cassandras, as manifestations of a more realistic and virile con-

cept of liberty at work in the realm of law. And, with it all, and as a steadying influence, we may note that with this urge for the new there is, also, a revival of faith in the old. There is a return to certain traditional concepts of the real meaning of life. I sense a growing renewal of our ancient faith in the old simplicities, in the tested validities of self-discipline, in the saving grace of a more real and less hectic education, and in an increasing faith in a more vital and living religion.

One of the most palpable changes now taking place in politics and economics, and also in law, is the demand for a more realistic approach to all their functions. Society as a whole is becoming more realistic—more interested in facts than in theories. It is one thing to formulate a principle, but it has validity only if it can translate itself, so to speak, into action. It is liberty in action and not as a theory, just as it is law in action, that interests the man of today. Not action just for the sake of action, but action conceived, let us say, as a principle in itself: the principle of going forward, of getting results, of doing something, of taking chances, experimenting, changing, living.

If there is a law of progress, isn't the heart of it just this? If there is an emergency, this principle of action says meet it—act.

More than one hundred years ago (1829) William Ellery Channing wisely asserted that: "There are seasons in human affairs of inward and outward revolution, when new depths seem to be broken up in the soul, when new wants are unfolded in multitudes, and a new and undefined good is thirsted for. These are periods when the principles of experience need to be modified, when hope and trust and instinct claim a share with prudence in the guidance of affairs, when, in truth, to dare is the highest wisdom."

XII

In spite of so many evidences to the contrary, I believe that all these ferments indicate that not alone are we passing into a period of more practical realism, but we are moving, also, from an era of complexity and confusion to one of simplification and unification. First thesis, then antithesis, then synthesis, says Fichte. May we not be in the

period of synthesis? Is not the entire world experimenting with the necessary hypothesis on which to construct such a synthesis? Must there not be greater unity and simplicity, if the social order is to thrive and man enjoy true freedom under it?

Indeed, the more I think about it, the more rational it seems to believe that human co-operation, in the spirit of simple justice as the substance of liberty, may be the one and only workable formula. Not co-operation as a dogma or abstract principle, or enforced as a rule of law, but co-operation as a social polity, and as a living, vibrant reality.

No two forms of conduct are precisely alike and neither are any two individual controversies. With the extraordinary growth in the complexities of modern society which has seemed to call for increasing control we are seeing an equally extraordinary growth of all manner of administrative agencies. May it not be that this relatively sudden development is due not entirely to the need of finding new agencies in an expanding social order, but relates, also, to the failure of law to

recognize the essential uniqueness of the individual or to satisfy his need for greater individualization of treatment and for more direct guidance? When we are able to think of liberty as protected by the principles of an established legal order, we are far more easily reconciled to results even when they bear heavily upon us, than we are when our ideas of freedom face definition under a less familiar system. Manifestly, new reconcilements are necessary if the essence of liberty is to be nourished and protected as we advance into the widening area of administration.

Part Three

LIBERTY UNDER ADMINISTRATION

LIBERTY UNDER ADMINISTRATION

I

"Government, to define it *de jure*, or according to ancient prudence," said James Harrington two centuries ago, "is an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest; or to follow Aristotle and Livy, it is an empire of laws and not of men."

The general trend of what I have heretofore said indicates how, in the flux and flow of time, both the empire of laws and the empire of men have undergone change; and how, persisting through it all, there remains one constant—man's urge for liberty and justice. Its scope and vitality are reflected in the systems which the social organism develops and tolerates. New conditions create both new conceptions and new definitions of liberty, as well as the mechanisms for their fulfillments and protections.

Under the extraordinary measure of individual

liberty which the modern world has achieved, science and human enterprise have brought about a social order with complexities and interrelations which find no parallel in any other period of history. Unusual forces are at work, manifesting themselves in all manner of social aims and ideals. How individual liberty is to fare, under any mechanisms society may create, is obviously of vital importance.

Society is not only setting up new devices of government, but the relation of the individual to them, and to society as a whole, is taking on a different character. We are more inclined to regard the individual as a social being, and greater concern is shown for his rights in terms of the social organism, than for his rights in terms of law. To many this spells a new social order. To me it seems rather to presage something of an intensified individualism under the existing order, with the consequent development of fresh concepts of liberty and the need of new agencies to define and secure them.

The law, or what we ordinarily mean by law, can supply many of these agencies, but not all.

Government, in addition to its traditional mechanisms for preserving law and order, is continuously establishing others, usually called administrative, whose bearing upon our freedom is so intimate and has such potentialities that we may well ask whether liberty is as well secured under them as it is under law. The law, in its slow and stately fashion, is approaching its problems with a comprehending spirit and, I think, with a new vision, a new sense of horizons and a new realism. But, the field of governmental administration has expanded so rapidly and has set up so many devices which function in areas of individual liberty which it is the traditional province of law to protect, that we are now confronted with the profoundly important problem of whether and how we can supply adequate safeguards under these altered conditions.

II

No development of recent years is more striking than the steady increase in the functions of government, and the insistent demand for such in-

crease. This is true of government everywhere and whatever its form. Indeed, most of the revolutionary and novel transformations now seen in other lands are probably due to shifting ideas of governmental functions. One might say that the political concept of government as government is changing just as is the political concept of liberty. Government becomes less of a political and more of a social phenomenon. It is a curious paradox that, at the very moment when the popular cry is for less government, the popular demand, nevertheless, is for more of it. Our legislative mills grind out laws with amazing prodigality and governmental agencies spring up to meet every demand of actual or imagined necessity. Very likely this is due to a variety of causes, such as survivals of our Puritan passion for reform and regulation; changes in the character of our social consciousness; reactions against *laissez faire;* and war and post-war experiences, with their exigent needs and emergencies. The result is that on the one hand our judicial mechanism is not geared to meet the situation or is put to undesirable strains and stresses and, on the other hand, our governmental

structure takes on colossal proportions with unusual powers and wide-flung administrative activities, that touch human liberty at every point.

I do not desire to weary you with an Homeric catalogue, but let us try for a moment to visualize the unending labyrinth of administration through which liberty must now find its way. Take first the great departments headed by members of the Cabinet, and which, administratively speaking, are ordinarily thought of as "the Government." These have grown into organizations with vast powers and with an official personnel as bewildering in size as it is in the variety of its duties.

In addition to these primary departments, and their various dependencies, we have developed a remarkable variety of other administrative agencies touching practically every phase of our lives. Some of these are actual tribunals like the Interstate Commerce Commission, and the Federal Trade Commission, and others act as purely administrative and executive functionaries in one way or another. Some have regulatory, others fact finding, and still others law executing and administrative powers; and most have all of these. The

field of these agencies is not only already of enormous size, but it is destined to increase. This is true not alone of the Federal Government, but of the States also.

Let me appropriate, in part, the vivid description given several years ago by Justice Rosenberry, in connection with a plea for some limitation of these administrative multiplications. He points out that we have administrative agencies regulating public utility corporations, business affected with a public interest, professions, trades and callings, rates and prices; laws for the protection of the public health and safety and the promotion of public convenience and advantage; examining boards and other bodies to pass on the competency, responsibility, or other qualifications of private schools, chauffeurs, engineers, surveyors, private detectives, real estate brokers, stockbrokers, teachers, chiropodists, nurses, public accountants, shorthand reporters, physicians and surgeons, midwives, peddlers, lawyers, dentists, pharmacists, plumbers, undertakers, embalmers, veterinarians, optometrists, architects, beauty parlor operators, employees of the State and its civil

divisions, and other professions, trades, and callings; also boards and commissioners of education, public service commissions, probation commissions, parole boards, athletic commissions to regulate boxing and wrestling contests, racing commissions, bank examiners, insurance departments, transit commissions, health boards (with divisions for the safeguarding of motherhood, saving of infant life, and instruction in child hygiene), child welfare boards, tax commissions, tenement house commissions, building commissions, water power commissions, water control commissions, commissions for the blind and for mental defectives, recreation commissions, boards of charities, agricultural commissions, conservation commissions, workmen's compensation and industrial commissions, boards of child welfare for the granting of mothers' pensions, motion picture commissions; and, in the Federal Government, the Interstate Commerce Commission, the Federal Trade Commission, the Railroad Labor Board, the various officers who supervise and regulate internal revenue, and many other persons and groups exercising a vast power that is granted in the most general terms.

III

If this appears like a confused jumble of administrative activity, it is also asserted that even greater confusion exists as to the nature of the powers involved and the state of the law in relation thereto. These agencies, for the most part, are creatures of legislation, and, thus, are expressions of the public will, even though the traditional attitude of the people has always been one of hostility towards a government of men and to all forms of so-called bureaucratic control. Nevertheless, statute after statute is passed creating and enlarging these agencies and conferring enormous powers that touch individual liberty at its most vital spots. Some of these statutes necessarily are vague and, even, uncertain; while others, it is claimed, confer powers of administration far beyond the reach of the ordinary processes of law. This point of view is well illustrated by Judge Cullen who, in one of his decisions, takes occasion to say that: "The great misfortune of the day is the mania for regulating all human conduct by

statute and, therefore, regulating liberty by administrative agencies"; and, he adds, that the responsibility for this is one "from which few are exempt, since many of our most intelligent and highly educated citizens, who resent, as paternalism and socialism, legislative interference with affairs in which they are interested, are most persistent in the attempt to regulate by law the conduct of others." "There ought to be a law," we say, and, when we get it, we do not concern ourselves about its administration until we become conscious of its personal impact.

IV

Such maladjustments as there are in the joint field of administration and of law, can be attributed, I think, very largely to certain cardinal causes: Our historic distrust of administration in general; our historic conception of and faith in law and its supremacy; our historic belief that a government should be one of laws instead of men; and finally, our historic and constitutional doc-

trines of the division and non-delegation of powers.

Because these agencies are usually political in origin, it may be that our reaction to them is also political and, thus, has an emotional content which is absent in our reactions to law.

The story of the rise, growth and persistency of this tradition and common state of mind is told on every page of Anglo-American legal and political history. Our faith in the rule of law, and our fear of officialdom, of "star chambers" and "executive courts," of arbitrary and irresponsible power, of permanency in office and of bureaucracy, are part of our social, legal, and political heritage. It has been a faith based on fear, which has often undergone curious transformation. In one period we put our trust in legislation and distrust the executive power; in another period we reverse the trusts and distrusts. Our history is full of such alternations. Today, the tendency throughout the world is toward an increase of executive power in its broadest aspects.

Our most abiding faith has been in the supremacy of law, and much of our distrust of adminis-

tration arises, at least in terms of liberty, from our inability to reconcile many of its activities and assertions of power with our notion of this supremacy. For this reason it is quite likely that we look too much to law for protections which a scientifically evolved "administrative rule of law" might also supply.

The conventional view of this matter is vigorously set forth by Lord Hewart of Bury, who, speaking as Lord Chief Justice of England, declares: "That there is in existence and in certain quarters in the ascendant, a genuine belief that the rule of law has been tried and found wanting, and that the time has come for the departmental despot, who shall be at once scientific and benevolent, but above all a law unto himself, needs no demonstration. . . . A mass of evidence establishes the fact that there is in existence a persistent and well contrived system to produce and which is producing, a despotic power which at one and the same time places Government Departments above the sovereignty of Parliament and beyond the jurisdiction of the Courts."

He says "It would be a strange misuse of terms

if the name of administrative law were to be applied to that which, upon analysis, proved to be nothing more than administrative lawlessness," and adds that "much toil, and not a little blood, have been spent in bringing slowly into being a polity wherein the people make their laws and independent judges administer them. If that edifice is to be overthrown, let the overthrow be accomplished openly. Never let it be said that liberty and justice, having with difficulty been won, were suffered to be abstracted or impaired in a fit of absence of mind."

V

If the expansion of administration appears to the distinguished jurist like a "new despotism," nevertheless, under the English legal system, the courts are not confronted with the same difficulties in finding a solution that face us under our constitutional system. Nevertheless, the trouble there, as here, is that law and government are probably thought of too much as if they were opposites or as if the body social had two organs, one political

and one legal. The historic development of such an approach is, of course, clear enough. The fight for the supremacy of law was thought of as a fight for legislative power as against the supremacy of the King—and sometimes an alien King at that. In the famous phrase of Bracton: "The King has a superior, to wit, the law; and if he be without bridle, a bridle ought to be put on him, namely, the law."

It goes without saying, of course, that all government, even a government of laws, is ultimately a government of men. Laws are created, construed, and enforced by men. This provision of the Massachusetts Constitution brought over from Puritan England, however, became a prevailing American doctrine and has had immense influence. What we really mean by a government of laws is that government itself, in its relations to our individual rights, is as subject to the "rule of law" as is the individual himself. The rule of law, says Dicey, "means in the first place that no man can lawfully be made to suffer in body or goods except for a distinct breach of the law established in the ordinary courts of the land." Moreover, it means

"that no man is above the law, but that every man, whatever his rank or condition, is subject to the ordinary law" and, likewise, "every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as is any other citizen." In short, any exercise of governmental power incompatible with the rule of law is an exercise of lawless power and is not a government of laws.

VI

Our colonial ancestors distrusted absolutism in government and all forms of officialdom. They believed that one way to protect their liberties, control their government, insure the supremacy of law, and checkmate arbitrary power was to keep legislative, executive, and judicial functions and powers separate and distinct, so that no one person or governmental agency could at one and the same time exercise more than one of those functions. This doctrine of the division of powers is usually attributed to Montesquieu, who early in

the eighteenth century conceived it, somewhat erroneously, to be a fundamental feature of British government. The idea passed readily into our political philosophy and became incorporated in our entire constitutional system, State and Federal. From the beginning it has been a cardinal tenet. True, it has never, in all its completeness, been literally or logically observed. The courts, by various fictions and distinctions and, sometimes, by strained and artificial reasoning, have found ways to modify it. But, aside from its constitutional integrity, it is an ingrained element in all our legal and political thinking and, in a way, has been an obstacle to the development of any scientific body of administrative law, as it is known, say in France or in other parts of Continental Europe.

Aside from a natural distaste for all bureaucratic officialdom, most of our legal, and much of our lay criticism of administration springs from problems involved in this division of powers. Perhaps, in the interest of logical consistency, we have made this doctrine of the immutable and inescapable division of powers too much of a consti-

tutional fetish. Experience has shown that if government is to be efficient, if it is to meet the needs of the people as expressed in legislation, if administration itself is to be effective, a certain amount of merging and over-lapping of these threefold powers is inevitable and, indeed, necessary and desirable. In fact, such a process has been going on steadily from the very beginning of our constitutional existence. It cannot be otherwise in the complicated modern state. The courts have excused and sustained these modifications by various refinements of legal reasoning, like calling administrative judicial action "quasi judicial," and by applying novel fictions and distinctions to what really are delegations of powers or rights of arbitrary discretion.

Many persons feel that they understand judicial justice, but they are puzzled by "quasi judicial" justice. Some one has referred to the administrative "quasi-judge" as "that judicial monster —a judge in his own cause." The more reasonable faults commonly found with these administrative tribunals are that, to a considerable extent, they are judicial without any of the safeguards which

long years of experience have thrown around the judicial function.

Granting that there may be much truth in this, yet it must be said, in all fairness, that howsoever sound such criticisms may be in theory they are not justified when we come to analyze the actual operations of many of these tribunals. The defects are more in the nature of possibilities than of actualities, though, to be sure, they are possibilities which should be foreclosed.

VII

After all, administration is government. It is both law and government in action. If it has its actual and theoretic defects, it, also, has its actual and potential virtues. In any event it, quite as much as law, is the unavoidable and, perhaps, the chief mechanism by which the social order works out its problems and through which liberty must find its fulfillments.

If there is need, as I contended earlier, for more realism in law, the same is equally true of administration. We need not condemn it out of hand, for

whatever its defects or its virtues, it is the inescapable medium through which government must work and, of course, it is also the chief device through which the present expansion of governmental functions is now actually taking place. We may as well recognize that the growth of these administrative agencies is a natural and, indeed, necessary factor in the modern state.

The business of government, for better or for worse, no longer falls within our old political categories. "To govern" has come to have a vastly different connotation from that which it had a century ago. Society as a whole, as differentiated from its individual units, now looks upon government as the protector not alone of individual rights and liberties, but of such rights and liberties as a social whole. In the interest of better control, affairs which were once regarded as individual and private now yield to governmental direction and even seek it. This to many may seem an unfortunate development, but it is largely responsible for the expansion of administration as a conduit through which exigent social needs may find effective expression.

While it might not be wise to attempt to check this expansion, surely we can find ways of controlling its powers and fitting them into a system of law that will limit its possible invasions of liberty. This is a problem that both law and government must meet and are, in fact, meeting to a far larger degree than many critics seem to realize. Already we have a substantial body of what is administrative law, whether or not we call it that. These administrative tribunals have evolved rules, and procedural methods of adjudication, which, in effect, uphold the supremacy of law even if, in a sense, it is the supremacy of laws of their own making or as made by themselves for the control of their own actions.

Through years of experience and of trial and error, these agencies have now developed precedents, standards of reasonableness, methods of determining facts, and an administrative technique. What has taken place was prophesied by Mr. Dicey when the famous Arlidge case so upset the equanimity of English common law jurists. This revolutionary decision, he pointed out at the time, "may lead to the result that a governmental de-

partment which is authorized by statute to exercise a judicial or quasi judicial authority may, or rather must, exercise it in accordance not with the procedure of the law courts, but with rules which are found to be fair and convenient in the transaction of the business with which the Department is officially concerned." That is, they must, so to speak, evolve a legal system of their own. And that is precisely what has been happening.

VIII

Every one recognizes the evils of bureaucracy, with its red tape, its spirit of the inner circle, its inherent despotism, and its natural tendency to grow by accretions of power. But, is it not possible that our best protection against these very evils, at least in terms of liberty, lies in extending rather than abridging administration, and in giving it as definite a place in our jural system as it has in our system of government? If government is to be responsive to changing needs and is to meet the modern idea of its enlarged relations to the public welfare, can it not do so through its administrative

agencies quite as well, or often more swiftly and more effectively than through law or legislation? Indeed, are we not led, by imperative necessity, to that course?

There are large areas relating to public welfare and to individual freedom, in which law and legislation cannot operate with that comprehension or expedition, or that individualization of treatment, which our complicated society insistently demands. If you look at it in its broader aspects this growth of administration is a logical product of democracy. It really is democracy in action, just as it is government in action. The State is always an abstraction. Administration converts the abstract into the concrete. It brings government closely home to the people. If these are the agencies through which sovereign government must operate, they are also agencies through which self-government can operate. If public opinion now expects more of government than ever before it is quite likely that administration, properly conceived and controlled, can meet such demands even more satisfactorily than abstract law or specific legislation.

So let us not look on administration as merely a necessary evil or distrust it too much. If it is a government of men, it lends itself much more readily to the actual needs of the social organism than does an academic government of laws. Administration is flexible. It permits of necessary experimentations and expediencies. It supplements the rule of law. It can advise, direct, and counsel; and can define and protect, and even adjudicate, rights and duties before rather than after their violation. It can be an extraordinarily effective means of enlarging and safeguarding our liberty. Moreover, it is the only nonpolitical medium through which trained men can be brought into the public service.

If there is one thing, more than any other, which all government now requires in this highly complicated and interrelated world, it is the much abused and much distrusted expert. We have entered an era of specialization. The day of haphazard government is over. "Brain Trusts" may go out of fashion, but not the need for brains. We expect trained minds in law and in statesmanship, but we have equal need for them in administration.

It is there precisely that they can best become a part of the governmental equation. Legislators cannot function as experts in administrative government. There is scarcely a question with which government has to deal which does not call for highly trained and specialized treatment.

"The ideal which has been presented in justification of these new agencies, and that which alone holds promise of benefit rather than of hurt to the community," says Mr. Chief Justice Hughes, "is the ideal of special knowledge, flexibility, disinterestedness, and sound judgment, applying broad legislative principles, that are essential to the protection of the community and of every useful activity affected, to the intricate situations created by expanding enterprise."

The point I stress is that these administrative agencies are the media through which the modern State can best call to its service that expert and specialized knowledge which today, far more than ever before, is the *sine qua non* of good government, and that, therefore, we should think of administration as an integral part of our system of government quite as much as is our system of

law and of legislation. At the present time we are particularly conscious of the part these agencies play in our governmental system. This is due in part to the fact that they are the instrumentalities by which the nation is trying to meet emergencies and through which it is using powers hitherto unused except in time of war. It is due, also, in part to the fact that they are the most visible instrumentalities through which a marked centralization of power appears to be taking place.

That centralization, especially in its Federal phases, is quite likely to increase. The economic and social drift indicates this, though we need not, therefore, jump to the conclusion that this implies a socialist or communist, or "corporative" or "totalitarian" or autocratic political State. Is it not possible, that the best way of controlling this centralization, and fitting it into the democratic pattern, may well be found in this very domain of administration? May it not be that we can here best find the instrumentalities for working out that co-operation in government as a whole, which now, more than ever before, is an essential in the pro-

tection of our common welfare and our common liberties?

IX

Adverting again to the need of trained minds in the intricate business of government, let me digress for a moment with a word to students looking out upon the future and wondering about its opportunities for a successful life. In my college days we considered the study of political science as an academic contribution to our general culture. Actual government, in its practical phases, we regarded as having to do with politics. Like many, today, we were inclined to look down upon politics as a selfish game played by politicians. Some of us, no doubt, contemplated taking part in it, but few of us considered government service as a field for which we might train quite as appropriately as we did, say, for law or medicine. Today, we are emerging from an era that witnessed the curious phenomenon of people thinking that the way to cure all social ills was by political

methods, and yet, at the same time, remaining contemptuous toward everything political. A better conception of government in its administrative phases is steadily developing. This, of course, creates a widening area of activity for young men if they will equip themselves for it as deliberately as they do for service in the occupational world. If the future of civilization is a race between education and disaster, there is no department of life in which the one can defeat the other so effectively as in the realm of governmental administration.

Then, too, it might be well to consider these new opportunities from the point of view suggested by the amazing statistics recently assembled which show, by a sort of geometrical progression, that the number of college graduates is increasing, as compared to the number of available positions. Well, here is the Government, State and Federal, that will be all the better for the educated man, from Cabinet officer to policeman. Not only will it be all the better, but with its increasing administrative range, it cannot go on without him. The scientific and technical departments of government are already filling up with trained men

who find their satisfaction in a self-sacrificing, though rather poorly rewarded, service to their country. It is an inspiring life's work, imperatively required throughout the whole vast range of administration. So, instead of trying to crash the gates of occupations already overcrowded, why not enter the wider areas where the space is ample and the need is great? The government spends millions to train its soldiers and sailors; and the colleges spend more millions in sheer education. Why not give administration the benefit of that training? Why should not such service, in spite of its limited financial rewards, be one of highest aspirations of educated men?

X

It goes without saying that no system of free government can survive that is not based on the supremacy of law; and no system of administration is tolerable in a free country which does not conform to that basic principle. Still, in spite of constitutional difficulties like the division and delegation of powers, the due process rule, and the

like; and notwithstanding our traditional attitude towards law and administration, there should be no insuperable obstacles in so reconciling the two and in so co-ordinating their functions, that each, in its appointed way, may protect individual liberty and do individual justice. And such reconciliation of what in effect are two rival agencies is, of course, the crux of our problem.

"The two rival agencies in government," says Dean Pound, "are law and administration. Administration achieves public security by preventive measures. It selects a hierarchy of officials to each of whom definite work is assigned, and it is governed by ends rather than rules. It is personal. Hence it is often arbitrary, and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But, well exercised, it is extremely efficient; always more efficient than the rival agency can be. Law, on the other hand, operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act, but imposes pains on those

who do not act in accordance with the rules prescribed. It is impersonal, and safeguards against ignorance, caprice, or corruption of magistrates. But, it is not quick enough, or automatic enough, to meet the requirements of a complex social organization."

Under the requirements of the social order of today, such continued rivalry may easily lead to injurious consequences. It may become a perplexing game in which individual right must grope in the dark for effective definition. Most issues of justice or conflicts of right, of course, are clearly within the domain of law and are best disposed of there; but, there are other issues and conflicts which could be better resolved by the mechanism of administration if it were more consciously and effectively fitted into our jural system. This means that we shall have to evolve a more definitive system of administrative law than we now have. Such a program is one to which many, perhaps most, English and American lawyers are unsympathetic, even though there is no valid reason why they should be. At least, the long experience of Continental Europe does not justify such antipathy.

There are sound reasons why we should not attempt to pattern after these foreign models, or endeavor to build up as distinct a system of administrative law as, say, that of France. But there are many reasons why we should profit by that experience, for our existing system certainly lends itself to many actual and potential abuses. I shall not stop to describe the French system, with its special administrative courts and its elaborate body of administrative regulation, except to say that this law is deliberately conceived not to abridge but to enlarge the liberty of the individual; and that its special administrative courts, particularly its Council of State as an administrative court of last resort, have actually been able to protect liberty from bureaucracy and the abuse of administrative power far better than we have been able to do so under our two rival systems. "It would be difficult," says Leon Duguit, "to find a country in which the individual is more energetically protected than in France against arbitrary administrative action. As a result of the liberality with which the *Conseil d'Etat* admits complaints against acts *ultra vires* and the extent

to which it insists upon official responsibility, the individual enjoys in France a high degree of protection against illegal, improper, or imprudent acts of the administration, and even against injury which he may suffer as a result of the normal operation of a public service." Certainly this cannot be said under our system where the individual, for the most part, must look to the ordinary courts of justice for whatever protections there are against the dangers or abuses of administration. There is no controlling reason why this should be so.

Even admitting that there is a considerable degree of actual administrative lawlessness which can easily impair our liberty, the way to meet such peril is not alone by relying on "the rule of law" as known to the courts, but by relying, also, on "a rule of law" definitely known as administrative. Certainly it should be just as possible, for instance, to delimit our rights under the latter system as to have them defined indirectly under the former. Nor should there be any real difficulty in working out a system of review, not unlike the French, and through it to find ways of controlling

arbitrary discretion or to establish necessary means of attaining that certainty and uniformity of action which is the pride of the law. The time has come, it seems to me, to cease looking at administration from the political viewpoint and to see it more as an integral part of our system as a whole—jural, legislative, and executive.

In the words of Mr. Justice Holmes: "It is as it should be, that the law is behind the times. . . . While opposite convictions still keep a battle front against each other, the time for law has not come." Yet, the time for social or business or governmental action may have come, and cannot await the slow and stately tread of the law. Let us carry this idea a step farther. In the conduct of life and all its varied enterprises, the law at best can deal only with given controversies, according to a generalized rather than an individualized rule, while administration need not thus be hampered. "General propositions," said Mr. Justice Holmes in the famous Lochner case, "do not decide concrete cases. Their decision will depend on a judgment or intuition more subtle than any articulate major premise."

Doubtless it is through the responses of administration, rather than through those of law, that this social intuition can best become articulate. How shall we control this expression so as to preserve our liberty, if social demands become too insistent or our own ideas of freedom undergo fantastic transformation? From primitive times down through the centuries, the race has fought against despotism and arbitrary power; and struggled to bring regulation into a just relationship to liberty. The product of these hard-won battles has been the establishment of the supremacy of law. Nothing can be tolerated that robs us of this.

XI

The immediate question with which our people must deal is how administration can be brought into balance with law and made subject to its supremacy, in such fashion that we shall be privileged to meet the pressing social needs of our time and enter wider fields of liberty than we have thus far known. In due course the answer will be found and we shall pass on to other achievements. But,

after all, it is an unending quest. Liberty recedes as men advance. The passion for its realization stirs at the roots of life. The ancient struggles that centre about the heart of this problem will have their counterparts as history unfolds. It is not our portion to supply the ultimate solution, but it is our part to advance the processes that carry us forward on the road to which these ideals so constantly beckon.